KEJURUTERAAN TAIPAN (M) SDN BHD A

v.

LOH & LOH CONSTRUCTION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR B
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: S3-22-323-2001]
29 NOVEMBER 2004

CIVIL PROCEDURE: *Costs - Security for costs - Defendant's application against plaintiff - Application made on the ground that plaintiff was wound up and prima facie unable to pay costs in the event plaintiff's action dismissed - Whether plaintiff's winding up sufficient ground to order plaintiff to furnish security for costs - Whether also defendant's delay in making application justified* C D

The defendant appealed against the decision of the senior assistant registrar dismissing its application for security for costs against the plaintiff pursuant to s. 351 of the Companies Act 1965.

Held (dismissing the appeal): E

(1) Since it was the defendant who was applying for security for costs, therefore the defendant had the legal burden to justify to the court as to why it was entitled to costs. The defendant failed to discharge that burden. The only reason given by the F defendant for the application was that the plaintiff had been wound up and therefore in no financial position to satisfy the defendant as to costs in the event the plaintiff's action were to be dismissed and costs awarded to the defendant. This reason was insufficient for the court to compel the plaintiff to G furnish security for costs. Although by reason of the winding up order, the plaintiff would be unable to pay costs (unless evidence to the contrary was given), the court was not bound to order the plaintiff to furnish security for costs on the basis that the plaintiff had been wound up. The court still has H discretion. The court must consider all the circumstances of the particular case. Section 351 of the Companies Act 1965 uses the word 'the court … may' and not 'the court … must'. The defendant failed to show the full circumstances of the case justifying an order to compel the plaintiff to furnish I

security for costs. The defendant had only shown the fact of the plaintiff having been wound up. That was not enough. (paras 3)

(2) There was inordinate delay on the part of the defendant in making the present application. There was a lapse of almost three years between the date the plaintiff was wound up and the defendant's present application. The defendant's explanation that they had to apply for leave from the official receiver before proceeding with the present action was unsatisfactory. Leave was granted by the official receiver on 22 July 2003 but the present case was filed only in January 2004. The defendant failed to explain that delay. (para 4)

Case(s) referred to:
Sir Lindsay Parkinson & Co v. Triplan Ltd [1973] 1 QB 609 ***(refd)***
Yee Hua Holdings Sdn Bhd & Anor v. Chin Yew Nam & Ors [1999] 2 CLJ 63 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 351

For the plaintiff - Venu Nair; M/s Paul Cheah & Assoc
For the defendant - Celine Chelladurai; M/s Thompson Assoc

Reported by Usha Thiagarajah

JUDGMENT

Hishamudin Yunus J:

[1] This is an appeal by the defendant against the decision of the learned senior assistant registrar who had dismissed the defendant's application for security for costs against the plaintiff pursuant to s. 351 of the Companies Act 1965.

[2] I have dismissed the appeal with costs.

[3] In my judgment, since it is the defendant who is applying for security for costs, therefore, the defendant has the legal burden to justify to the court as why they are entitled to security for costs. It is not for the plaintiff to satisfy the court as to why they should not furnish security for costs. In my view, the defendant has failed to discharge this burden. I hold this view because upon

examining the defendant's supporting affidavit, I find that the only reason given by the defendant for the application is that the plaintiff had been wound up and therefore *prima facie* was in no financial position to satisfy the defendant as to costs in the event the plaintiff's action were to be dismissed and costs awarded to the defendant. To my mind, the reason given by the defendant (that the plaintiff company had been wound up and *prima facie* unable to pay costs) is insufficient for the court to compel the plaintiff to furnish security for costs. More must be shown to the court. I, however, do accept that as a matter of principle, by reason of the winding up order, *prima facie*, the plaintiff is unable to pay the costs – unless evidence to contrary is given. However, it is also a principle of law that a court is not bound to order a plaintiff to furnish security for costs just because the plaintiff has been wound up and *prima facie* is unable to pay costs. The court still has a discretion: the court must consider all the circumstances of the particular case (see *Sir Lindsay Parkinson & Co. v. Triplan Ltd.* [1973] 1 QB 609). Indeed s. 351 of the Companies Act uses the word 'the court … may' and not 'the court … must'. In the present case, the defendant has failed to show to the court the full circumstances of the case justifying an order be made to compel the plaintiff to furnish security for costs. The defendant has only shown the fact of the plaintiff having been wound up. This, as I have said, is not enough.

[4] Secondly, there has been inordinate delay on the part of the defendant in making the present application (see *Yee Hua Holdings Sdn Bhd & Anor v. Chin Yew Nam & Ors* [1999] 2 CLJ 63). The plaintiff company was wound-up on 26 May 2000. The plaintiff company filed the present suit in April 2001. Yet the present application by the defendant (that is to say, encl. 21) was only filed in January 2004 – a lapse of almost three years. The defendant's explanation for this long delay is that since the plaintiff has been wound up, therefore, they (the plaintiff) have to apply for the leave/permission of the official receiver first before they could proceed with the present action; and, in the event the official receiver refuses to grant leave, then an application for security for costs would be unnecessary. I find this explanation unsatisfactory. If indeed leave of the official receiver (for the plaintiff to sue the defendant) was such an important consideration

A to the defendant, then, why did the defendant file the present application only in January 2004 when leave was granted by the official receiver much earlier on 22 July 2003? Why did the defendant wait until January 2004 to file the present application?

B [Appeal dismissed with costs.]

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